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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724.

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington, *Respondent.*

REPLY BRIEF.

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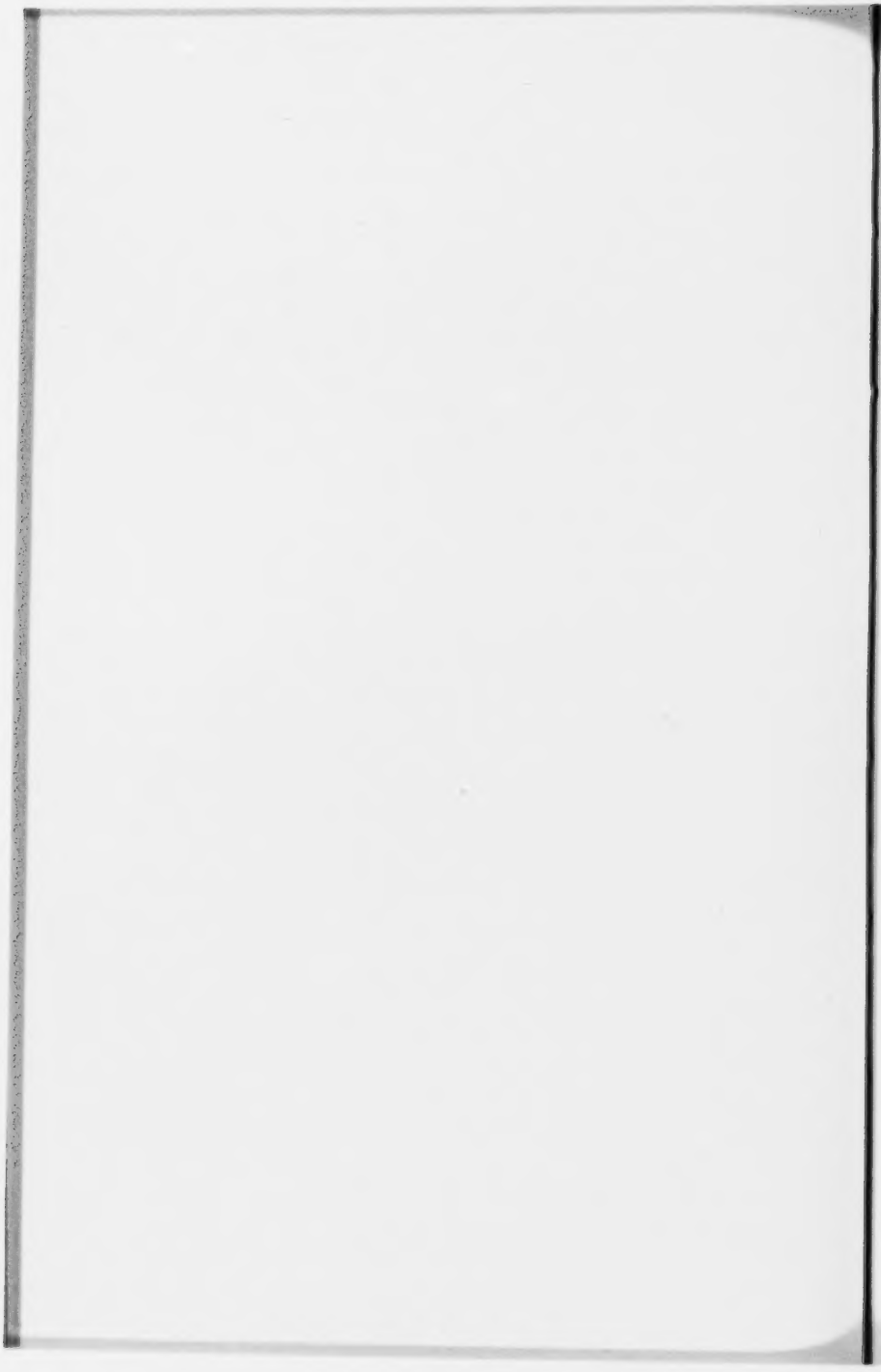

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REPLY BRIEF.

Petitioner, for reply to the Government's answering brief, believes that it will be shown that the Government's extremely able and widely experienced attorneys, while saying all that possibly could be said in opposition to the petition, fail to answer any of the grounds on which petitioner has urged that he was, on the trial and on the hearing herein, denied due process and his constitutional rights. The inability of the learned, able and experienced government counsel to answer these grounds is most persuasive proof that they are valid and unanswerable.

PRELIMINARY.

The Government fails to refer to the two general rules stated under this heading in petitioner's brief, (and thereby concedes their force and applicability here),—

1. that, as petitioner conducted his own defense, "the record must be closely scrutinized to see that his rights * * * have been protected," (17 C. J. § 3541); and

2. that "it was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants * * *." (Commonwealth v. Sacco, 255 Mass. 369.)

Yet, these two established and recognized rules accompany and weigh heavily in the consideration of every aspect of the proceeding, and its consideration as a whole. These rules accompany and, in a measure, protect the defendant throughout the consideration and determination of the case and until a final decision is reached, just as do the presumption of innocence and the doctrine as to reasonable doubt.

I.

Petitioner contended that refusal of the courts below to hold that payment of alleged experts' fees violated the two statutes in point and the statutory procedure provided thereby, resulted in denying petitioner an impartial trial and violated his constitutional rights. The Government fails to adequately or even really answer this contention.

(a) The Government states that petitioner relies on the Department of Justice Appropriation Act of 1939, Act April 27, 1938, c. 180, 52 Statute 268, which is only partly true: as petitioner relies also on § 601, Title 28, U. S. C. A. and on the cases cited by him in Subdivision (c) of Point I, p. 11, his brief, said § 601 providing that a witness should be paid $1.50 a day for each day's court attendance and the authorities hold that "an expert witness may be compelled to testify * * * without any compensation other than the fees of an ordinary witness."

(b) Next, the Government says that the Appropriation Act appropriated a sum "for * * * miscellaneous expenses * * * including experts * * *," inferring that this provision contradicts the one forbidding the use of the money appropriated for the payment of experts, which is not at all the case: experts can be paid for preparation of a case, (which

is not involved here), but were limited to the payment of $1.50 a day for testifying.

(c) The Government mistakenly assumes that said § 601 and said provision of said Appropriation Act and the numerous cases holding that "an expert witness may be compelled to testify * * * without any compensation other than the fees of an ordinary witness," may be ignored, whereas, of course, they are binding and prohibited the payments made to the alleged experts.

(d) Next, the Government claims that petitioner was bound to prove bribery and that he failed to do this. In this claim the Government ignores the judicial definition of bribery which "may be defined (as) the giving * * * to another anything of value * * * to influence him in the discharge of some legal duty," (*Dishon* v. *Smith*, 10 Iowa 212, 221), and petitioner did prove the giving to these alleged experts of $25.00 a day for testifying, to influence them in the discharge of their legal duty to testify. So, complete proof was made.

II.

Petitioner asserted that the district court erred in excluding testimony as to bias of the witness Tarr. The Government mistakenly claims that such testimony was not excluded.

(a) Petitioner alleged in his petition and asked to prove that Tarr went to the mine owners and asked for a job, and told the owners that the property was valuable, and then testified that the property was worthless. The court limited the testimony to bribery, (Tr. 8-55-56).

(b) Exclusion of this evidence was highly prejudicial and the facts were learned only shortly before the hearing in the district court. It was the District Attorney's duty to swear only unbiased witnesses. He could, and should have easily learned of Tarr's bias. His violation of his

duty resulted in petitioner being denied a fair trial. (*Commonwealth* v. *Sacco*, 255 Mass. 369; *Lisenba* v. *Calif.*, 314 U. S. 236, 237; *Martin* v. *U. S.*, 17 F. (2d) 973; *Larrison* v. *U. S.*, 24 F. (2d) 82; *Walker* v. *Johnson*, 312 U. S. 286; *Davis* v. *Ivey*, 112 So. 264.)

(c) Even a strict reading of the record does not justify the Government's contention that the petitioner did not offer to prove bias, but shows that he did make the offer, and as, and solely because, he was overruled, he felt compelled to rest his case on bribery.

In construing this part of the record, we are bound to bear in mind that petitioner conducted his own defense and "the record must be closely scrutinized to see that his rights * * * have been protected," (17 C. J. §3541).

(d) Next, the Government assumes that proof of bias is unimportant and that it was necessary to prove corruption which, as appears from the numerous cases cited hereinabove and quoted on Pages 15-16 of petitioner's brief, is not the rule, but a showing of bias and prejudice alone would be sufficient and far more so when connected with the other circumstances in this case.

III.

Petitioner next claimed that excluding evidence that the witnesses Tarr, Evans and Downing were not qualified and did not testify as experts, was error, as payment of expert fees to them violated the statutes as to fees and the established procedure, and petitioner was thereby denied a fair trial.

The Government mistakenly urges that the Judge was justified in concluding that petitioner must have known that these witnesses were experts and cites as proof of this that a juror asked to be excused because Tarr, a friend, "would be called in the nature of expert testimony on coal." In this argument the Government again overlooks the dis-

tinction of paying a witness for *preparing and for testifying*, and also overlooks the fact that Tarr swore that he was getting $25.00 a day *while at the property*, thus concealing the payment to him for testifying, (Tr. 45).

Next, the Government claims that petitioner must have known that the witnesses were experts because he moved to strike out the testimony of Evans, Downing and Tarr and others who testified as to the value. But, a motion, of course, could be made to strike out the testimony of an ordinary witness, and it does not follow at all that petitioner knew the witnesses were experts because he moved to strike out their testimony. Again, the Government claims that the inconsistent statements by Downing and Tarr, which petitioner contended would support his charge of bribery, were as to value, but a witness is not necessarily an expert because he testifies as to value.

In considering and determining the questions under this point, it must be remembered that,—

> "* * * The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (*Walker* v. *Johnson*, 312 U. S. 286.)

IV.

Next, petitioner contended that the destruction of the trial minutes by the government's "Official Court Reporter" has made it impossible for petitioner to show that he was denied an impartial trial. The Government contends on an incomplete statement of the facts, that there is no inference of an attempt to conceal evidence and further mistakenly contends that the destruction was not that of one whose act was binding on the Government.

(a) The Government contends that, as the minutes were destroyed several years after petitioner's appeal had been determined, no inference of an attempt to conceal evidence

can be drawn. The appeal was determined December 18, 1940 (*Walker* v. *U. S.*, 116 F. (2d) 458), and the minutes were destroyed early in 1943, so the destruction was only two years after decision of the appeal.

But, the decision of the appeal is of no importance on the question as to the purpose in destroying the stenographer's notes: the important fact is that the minutes were destroyed early in 1943 while the appeal in this proceeding was pending, which was decided November 24, 1943.

The Government, by its argument, apparently concedes that, if the destruction occurred while an appeal was pending, (and they were destroyed at such a time), this at least justifies, if it does not necessitate, an inference of an attempt to conceal evidence.

(b) The Government errs in its contention that the "Official Court Reporter" was not an officer of the United States. He was such an officer and his acts bind the United States:

1. Counsel for petitioner is advised by government counsel that the district judge appoints an "Official Reporter," who acts as such in Government cases and legal matters.

2. As appears from his letterhead, Anderson, who took the minutes on the trial herein, is known as the "Official Court Reporter", undoubtedly with the full knowledge and approval of the district judge, and *Anderson is recognized as having a government standing by being given an office in the Courthouse.*

3. Anderson, the "Official Court Reporter," must have been paid by the Government because, until after the trial, petitioner defended as a pauper.

4. As Anderson had the right to exercise a public * * * employment and to take the fees and emoluments thereunto belonging, he held an office, (2 Blackstone Com. 36; see also the very numerous definitions of a office, beginning at Page 4921 in Vol. 6 of Words and Phrases, the public

employment of Anderson being an office within many of these definitions.)

5. As the Government has asserted and permitted Anderson to assert that he is an "Official Court Reporter" it cannot now assert the contrary, (31 C. J. S. 108, p. 341); and the doctrine of equitable estoppel applies as against the Government, (Id., § 140, p. 411).

6. As the Government destroyed the minutes of trial, there arises a conclusive presumption that there should have been a verdict of "not guilty" and this cannot be rebutted by secondary evidence. (See authorities on Pages 21-23 incl., original brief.)

CONCLUSION.

As stated at the beginning of this brief, the Government, with its force of extremely able and experienced attorneys, has failed to answer any of the sufficient grounds advanced by petitioner in his original brief for his claim that he was denied a fair trial and his constitutional rights, which is not alone persuasive, but decisive proof that petitioner's grounds are valid and unassailable.

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